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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-659

WESTERN UNION TELEGRAPH COMPANY, *Petitioner*

v.

RAY MARSHALL, SECRETARY OF LABOR, *Respondent.*

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of more than 3700 state and local chambers of commerce and professional and trade associations, and over 65,000 business firms.

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

The Chamber participated as an *amicus curiae* in the proceedings below before both the district court and the court of appeals. In addition, the Chamber has frequently participated as amicus curiae in a wide range of significant labor relations matters before this Court. *E.g., Connell Construction Co.* v. *Plumbers, Local 11,* 421 U.S. 616 (1975); *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12 (1974); *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974).

The interest of the Chamber and its members in the instant case results from the necessity of maintaining a balanced national labor policy. The resolution of the paramount issue in this case, whether the overtime compensation requirement of the Fair Labor Standards Act is applicable to normally exempt managerial and supervisory personnel who replace striking workers, is of vital significance to the Chamber and its members.

The holding of the court below, that management employees must be paid one-and-one-half (1-½) times their management salary, places a substantial economic burden on strike-bound employers, severely restricting or eliminating the ability of those employers to continue operations during the strike. The net result of the holding is to upset the delicate balance which exists in labor-management relations and therefore interfere with the free flow of commerce. Accordingly, the decision below interferes with the right of Chamber members to exercise their right to free collective bargaining guaranteed by the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

For the first time in the thirty-nine (39) year history of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.,* the Department of Labor has sought in this case to impose the overtime provisions of that Act, 29 U.S.C. § 213(a), on normally exempt, management personnel who temporarily replace striking workers.[2] A substantial federal question is presented by virtue of this interpretation's direct conflict with the policy of free collective bargaining, without governmental interference, guaranteed by the National Labor Relations Act. 29 U.S.C. § 141 *et seq.*

The judicial extension of the overtime compensation requirement to supervisory and management personnel, despite contrary judicial precedent[3] and legislative history,[4] drastically alters the balance of the collective bargaining process so carefully crafted by Congress[5] and severely restricts the ability of management to counter and respond to the economic pressure which may be applied by a union during a labor dispute. If permitted to stand, the decision of the Court of Appeals will result "in a significant shift in the balance of free economic bargaining power struck by Congress." *International Association of Machinists and Aerospace Workers, et al.* v. *Wis-*

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[2] The *amicus* relies on the Petitioner's statement of the case and hereby accepts and adopts the arguments set forth in the petition for writ of certiorari.

[3] *McReynolds* v. *Pocahontas Corp.,* 192 F.2d 301 (4th Cir., 1951); *Mafizola* v. *Hardy-Burlington Mining Co.,* 306 Ky. 492, 207 S.W.2d 769 (1947).

[4] *See, e.g.,* S. Rep. No. 884, 74th Cong., 1st Session, 5 (1937).

[5] *See, e.g., Teamsters* v. *Morton,* 377 U.S. 252, 260 (1964).

consin Employment Relations Commission, 427 U.S. 132, 156 (1976) (Powell, J. concurring) (hereinafter *Machinists* v. *Wisconsin*).

Further, because of the large number of labor disputes occurring nationwide every year, the holding will have an immediate and significant impact on the national economy.[6] Accordingly, the case is particularly appropriate for review by this Court.

The National Labor Relations Act (NLRA) establishes a system of free collective bargaining which requires good faith in bargaining but "leaves the adjustment of industrial relations to the free play of economic forces and seeks to assure that the play of those forces be truly free." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 183 (1941). This policy forbids governmental "intrusion into the substantive aspects of the bargaining process" and requires that the government not "regulate what economic weapons a party might summon to its aid." *NLRB* v. *Insurance Agents' Union,* 361 U.S. 477, 490 (1960). It is precisely this sort of governmental intrusion into the bargaining process that the Secretary of Labor has sought here. Clearly, the holding below is in direct conflict with the congressional intent "to allow the balance of bargaining advantage to be set by economic power realities." *NLRB* v. *Burns,* 406 U.S. 272, 288 (1971). *Accord, Machinists* v. *Wisconsin, supra,* at

[6] Work stoppages are not isolated occurrences. For example, between the years 1969 and 1973, there was an average of two thousand two hundred one (2,201) work stoppages per year which exceeded fifteen (15) days in length. Bureau of Labor Statistics, *Handbook of Labor Statistics 1975—Reference Edition,* pp. 394-95 (1975).

147; *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970); *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959); Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1409 (1958).

Collective bargaining is, in this context, after all, a test of the economic strengths of management and labor. *See, e.g., NLRB* v. *Insurance Agents' Union, supra,* at 489; *H. K. Porter Co.* v. *NLRB, supra.* In this test of economic strength both management and labor may resort to the use of economic weapons in attempts to obtain what they are unable to secure through peaceful bargaining. *Machinists* v. *Wisconsin, supra,* at 147. One of the most successful and visible forms of such pressure available to a union is the strike. Related and permissible methods of self-help available to employees include informational picketing, 29 U.S.C. 158 (b)(7)(C), and a refusal to work overtime, *Machinists* v. *Wisconsin, supra.*

Employers may also resort to the use of economic weapons in response to the activities of their employees. *Machinists* v. *Wisconsin, supra,* 147-53. Methods available to an employer in such an economic struggle include the lockout, *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1976), the hiring of permanent replacements, *NLRB* v. *MacKay Radio and Television Co.,* 304 U.S. 333 (1938), and the use of management and supervisory personnel to replace striking workers. *See NLRB* v. *Brown,* 380 U.S. 278, 281 (1965).

The use of management and supervisory personnel in place of striking workers is a legitimate and recognized response to a strike by an employer who is attempting to continue operation. It has, therefore, been

applied in labor disputes in a wide range of industries, including broadcast,[7] communications,[8] chemical[9] and petroleum.[10] *See, e.g.,* J. Robinson and R. Walker, *Labor Economics and Labor Relations* 369 (1973); J. Hutchinson, *Management Under Strike Conditions* 124-25 (1966); A. Rees, *The Economics of Trade Unions* 37 (1962).

The decision below, by requiring that management replacements be paid one-and-one-half (1-½) times their management salaries, will greatly increase an employer's cost of operating during a strike. It will, therefore, virtually eliminate use of this management tool. By impairing the effectiveness of this weapon, the overtime requirement will alter the calculation by both management and unions with respect to what demands management could feasibly resist and those to which as a matter of practical economics it would have to accede. *See generally* Cox, *Labor Law Pre-emption Revisited,* 85 Harv. L. Rev. 1337, 1353 (1972).

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[7] NABET Members at ABC Wonder What They Won, *Broadcasting,* October 10, 1977 at 76; Coe & Holt, Radio & TV Unionism in Focus, *Broadcasting and Bargaining: Labor Relations in Radio & TV,* 38 (A. Koenig ed. 1970); At CBS the Show Goes On, *Business Week,* April 12, 1958 at 132-33.

[8] Wires Keep Humming in Phone Walkout, *Business Week,* April 27, 1968 at 102-03; Phone Supervisors Answer the Call, *Business Week,* Nov. 20, 1971 at 21-22; *New York Times,* Nov. 5, 1961 at 29, Col. 1.

[9] Strikes: What Softened the Punch?, *Chemical Week,* Oct. 5, 1963, 41-43.

[10] E. B. Shils, *Automation and Industrial Relations,* 175-76 (1963).

Two important factors must be considered when making these calculations. The first is the ability of a particular company to withstand the threat of a complete shutdown of its operations, and the second is the fact that many management and supervisory personnel are paid substantially higher salaries than those of the workers they are replacing. Consequently, the company must balance the possible loss of revenue from a shutdown with the cost of continued operation. The substantial increase in the cost of continued operations mandated by this decision will clearly affect the employer's ability to counter a strike. In this situation the employer is placed in the untenable position of being forced to submit to the strikers' demands, attempt to find skilled replacements, or pay prohibitively higher wages to the managerial employees. The result is that "one party to an economic contest [is denied] a weapon that Congress meant him to have available." Lesnick, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 Col. L. Rev. 469, 478 (1972), quoted in *Machinists* v. *Wisconsin, supra,* at 150.

Governmental intrusions of this nature, whether they act directly or indirectly upon the collective bargaining process, constitute an impermissible interference with the balanced labor policy created by the NLRA. The impact of this intrusion is analogous to the imbalance in collective bargaining created by a state's award of unemployment benefits to striking employees, while assessing their employers for contributions to support such benefits to the strikers.

In enjoining such an award by the State of Hawaii, the court stated:

> It was unquestionably the intent of Congress that collective bargaining, free from state interference, should be the foundation of the federal labor policy. (Citations omitted.)
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> * * *
>
> In the absence of any [express] Congressional approval, it can only be said that Hawaii's statute impermissibly intrudes into the area of labor law fully occupied by the NLRA.

Hawaiian Telephone Co. v. *State of Hawaii Department of Industrial and Labor Relations,* 405 F. Supp. 275, 290 (1976). The imposition of such assessments is indistinguishable from the economic burden upon strike-bound employees that the court below has imposed.

Congress has recognized in the National Labor Relations Act that collective bargaining unfettered by government intrusion is necessary to the free flow of commerce. 29 U.S.C. 141, 151 (1973). And this Court has recognized that "the presence of economic weapons in reserve and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB* v. *Insurance Agents' Union, supra,* 361 U.S. at 489. To restrict either the objectives for which economic pressure can be applied or the forms of pressure which are permissible tips the scale toward management or unions. Cox, *Labor Law Pre-emption Revisited, supra.* The action of the Secretary in the instant case severely tips the balance in favor of unions. We submit that only the Congress has the authority to upset the balance it established in the NLRA. *See* Cox, *Labor Law Pre-emption Revisited, supra,* at 1354.

CONCLUSION

For the reasons noted above, the petition for writ of certiorari should be granted.

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